record as presented no issue could be allowed, there being a case of privilege disclosed, and there being no averments of fact from which malice could be implied. There is now, in this second action, a record presented to the Court, in which very grave charges are made against the defender—many in number and expressed in very strong terms—stronger than in the course of a long experience I have ever seen in a case of the kind. Lord Dundas, in an opinion which I have had the opportunity of perusing, has given a full statement of the charges now made against the defender, and it is unnecessary to recapitulate them. They include accusations of deliberate and wilful falsehood—statements that the defender had received information regarding the conduct of the hospital officials, when in point of fact he had received no such information—that neither by hearsay or otherwise had he been informed of things as to which he asserted that he had been so informed; that he made statements knowing them to be false; and it is even said that he "invented" accusations which he knew to be untrue, and that he endeavoured to induce a public authority to give a decision contrary to what he knew to be the fact.

All these things are stated in the condescendence by the pursuer and maintained as fact by her counsel, who must be presumed to have well considered what allegations were to be made as stating matter of fact, and at this stage the Court must take the statements *pro veritate*, and, on the assumption that they do relate facts, consider whether they are such as to give ground for an issue based on malice. I agree with your Lordships that they do supply such ground. If they can be substantiated by evidence, then beyond doubt a case of malice would be made out. I therefore agree that the first and second issues should be allowed to go to trial.

I think it right to notice that there is another averment relating to a letter said to have been written to a member of the Local Government Board by the defender when he was endeavouring to induce the Board to take up the inquiry regarding the matters of which he complained. It is said that the letter was one in which he endeavoured unjustifiably to bring pressure to bear upon the Board, taking advantage of his distinguished position. It is alleged that the Local Government Board returned the letter to him. If so, it is in his possession, and is not as yet produced. If such a letter, written with such intent, was sent as alleged, I cannot doubt that it might be a question of fact for the consideration of a jury whether it afforded evidence of malice. At present when the contents are not revealed, I think the allegations regarding it may be taken into consideration in the question whether malice is sufficiently averred.

As regards the third issue, I concur with your Lordships in thinking that it ought to be disallowed. I am unable to see that reading the part of the letter in the schedule in any reasonable sense it can be held that there is any accusation made against the pursuer. The defender is referring to Mr Fleming's report, in which the pursuer is spoken of only in terms of approbation, but the report speaks somewhat strongly in regard to the want of truthfulness of some of the nurses in the hospital. When the defender in his letter speaks of "those who lied the most," the expression cannot be extended beyond those of whom Mr Fleming spoke, except upon the footing that it was intended to include the whole staff, for there is certainly no allusion to the pursuer individually. There is no indication that allusion is being made to any other persons than those whom the reporter had indicated as having prevaricated and so not spoken the truth. It therefore does not seem to me that the words quoted can bear the innuendo which the pursuer endeavours to put upon them. I am in favour therefore of disallowing the third issue, and the fourth and fifth having been withdrawn, the result will be that the first and second issues only will be approved of for the trial of the cause.

The Court recalled the interlocutor of the Lord Ordinary, disallowed the third issue, the fourth and fifth issues having been withdrawn, approved of the first and second issues for the trial of the cause, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for the Pursuer (Respondent)—Cooper, K.C.—Wilton. Agents—G. M. Wood & Robertson, W.S.

Counsel for the Defender (Reclaimer)—Clyde, K.C.—J. H. Miller. Agents—W. & J. Cook, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord Hunter, Ordinary.

THE FARMERS' MART, LIMITED *v.* MILNE.

Contract—Pactum illicitum—Double Interest—Direct and Necessary Double Interest.

An agreement between a company and their manager provided that the manager should be entitled to undertake any factorship or trusteeship on, or other office involving the management of, any estate, and should be bound to pool all remuneration derived therefrom with all fees and commissions derived by the company from any sales or valuations in connection with such estates, each party being entitled to one-half of the proceeds. The agreement did not bind the manager to employ the company for such sales or valuations. In an action of accounting by the company against their manager for fees earned by him as trustee under a trust deed for behoof of creditors, *held* (*rev.* judgment of Lord Hunter, Ordinary) that as under the agreement the manager was put in such a position that his

duty conflicted with his interest, even though no averment of corrupt conduct was made, the agreement was corrupt and illegal, and an accounting *refused.*

The Farmers' Mart, Limited, Brechin, *pursuers*, brought an action of accounting and for payment against John Milne, auctioneer, Brechin, *defender*, under an agreement dated 9th April 1907, by which the defender was appointed manager of pursuers' business. The agreement in question contained, *inter alia*, the following clause:—"*Fifth.* The second party shall be entitled, but shall not be bound, to undertake any factorship or trusteeship on, or other office involving the management of, any estate, provided always that before undertaking any such factorship, trusteeship, or office he shall first obtain the consent of the first parties, unless in the case of a testamentary or other gratuitous trusteeship, executorship, or factorship, any of which he shall be entitled to accept without the consent of the first parties. The fees or other remuneration derived by the second party from any such factorship, trusteeship, or office as aforesaid, accepted by the second party after the commencement of this agreement, shall (after deduction therefrom of all charges and other out-of-pocket expenses incurred by the second party in connection therewith, and that whether by way of legal, clerical, or other assistance or otherwise) be pooled with all fees and commissions, including fees for measurements, derived by the first parties from any sales or valuations in connection with any such estate under the management of the second party as aforesaid, and the proceeds thereof shall be divided in the proportion of one-half to the first parties and the other half to the second party, provided always that before any such division shall take place there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate after giving credit for all sums received or falling to be received on account of such debt, and that whether from the principal or any subsidiary or collateral obligant therefor, or from the respective estate of any such obligants. . . ."

The pursuers pleaded, *inter alia*—"(1) The defender being bound under and in terms of the said agreement of 9th April 1907, and in particular article fifth thereof, to account to the pursuers for all fees or other remuneration derived by him (*a*) from his said trusteeship on the trust estate of the said John Fairweather, and (*b*) in connection with the office of factor, trustee, or other office involving the management of any other estate undertaken by the defender during the period up to 19th August 1908, the pursuers are entitled to decree of accounting as concluded for, and on the balances due to the pursuers being ascertained in terms of said agreement they are entitled to decree for the same."

The defender pleaded, *inter alia*—"(1) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the defender is entitled to decree of absolvitor. (3) The agreement founded upon by the pursuers being void in respect it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 29th October 1913 repelled the first and third pleas-in-law for the defender and ordained him to lodge an account.

Opinion.—"The pursuers are a limited company and carry on business as live stock salesmen, agents, auctioneers, appraisers, and land surveyors in Brechin and elsewhere. The defender was manager of their business from 20th August 1899 until 19th August 1908. The action concludes—*First*, for an accounting of all fees or other remuneration derived by the defender prior to 19th August 1908 in connection with the office of trustee under the trust-deed for behoof of creditors granted by John Fairweather, farmer, Langhaugh, by Brechin, in defender's favour and dated 14th June 1907; and *Second*, for an accounting by the defender of all fees or other remuneration derived by the defender as trustee upon any estates other than Mr Fairweather's; with conclusions for payment of money alleged to be due in respect of such accounting. In terms of an agreement dated 9th April 1907, the defender was appointed manager of the whole business of the pursuers. He was to be entitled to engage in farming, but otherwise he was to devote his whole time to the management of the pursuers' business. By the fifth article of the agreement it was provided that the defender should be entitled, on obtaining the pursuers' consent, to undertake any factorship or trusteeship—the fees or other remuneration derived by the defender from such office to be pooled with all fees and commissions, including fees for measurements, derived by the pursuers from any sales or valuations in connection with any estate under the defender's management, 'and the proceeds thereof to be divided in the proportion of one-half to the first party and the other half to the second party, provided always that before any such division shall take place there shall, out of said proceeds, be paid to the first parties the balance of any debt remaining due to them from such estate after giving credit for all sums received or falling to be received on account of such debt, and that whether from the principal or any subsidiary or collateral obligant therefor, or from the respective estate of any such obligants.'

"On 19th August 1908 the agreement between the pursuers and the defender was terminated by three months' notice by the pursuers, and in terms of the second article thereof. Prior to the termination of his agreement the defender admittedly acted as trustee upon Mr Fairweather's and other estates. He declined, however, to account to the pursuers in terms of his agreement for the fees and remuneration received by him, upon the ground that the agreement to which he himself was a party is corrupt and illegal. The grounds upon which he maintains this position are thus

stated in his answers 2 and 3:—'The said fifth clause is void in respect that it provides (*a*) that the fees or other remuneration derived by the defender as the second party thereunder from any factorship, trusteeship, or office held by him should be pooled with all fees and commissions, including fees for measurements, derived by the pursuers as first parties thereunder in connection with any estate under the management of the defender, and divided equally between them, after making certain deductions therefrom; and (*b*) that the parties thereto bound themselves thereby to allow the debts due to the pursuers on such estates to be a first charge against the fees or other remuneration payable to the defender as trustee or factor thereon. It is against public policy that the pursuers should bargain for a share of the fees or other remuneration earned by the defender as a trustee under the Bankruptcy (Scotland) Act 1856, or otherwise, or that as creditors on bankrupt or insolvent estates the pursuers should secretly contrive to place themselves in a more favourable position pecuniarily than the general body of creditors by such a bargain with the defender as trustee or factor thereon. Further, the provision in the said agreement that the fees and commissions, &c., paid by estates upon which the defender is trustee should be equally divided between him and the pursuers is fraudulent. This latter provision was inserted in the said agreement for the purpose of inducing the defender, in his capacity as a trustee for creditors or for other beneficiaries, to employ the pursuers in connection with the business or affairs of the estates on which the defender was trustee, upon the footing that, unknown to his constituents, he should receive from the pursuers one-half of their fees and commissions chargeable against such estates.'

"In support of his case defender's counsel referred me to several cases. In *Laughland* v. *Millar, Laughland, & Company*, 1904, 6 F. 413, one of the directors of a company entered into an agreement with the managers of the company that if they received a bonus of £700 from the company on the sale of its business he should receive £200 from them. The contract was held to be illegal, and the managers were assoilzied in an action for the £200 raised against them by the director. The ground of that decision was that the managers and the director had entered into a combination to get into their possession a sum of money belonging to the shareholders, and in the evidence given by the director he admitted that but for the agreement he would have done what it was his duty to do, *i.e.*, he would have had the £700 divided among the shareholders. In *Harrington*, 1878, 3 Q.B.D. 549, it was decided, as put by Cockburn (C.-J.), 'that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be.' The defender's counsel founded strongly on the case of *M'Gowan*, 13th December 1808, F.C., where it was held that a bargain by a competitor for the office of trusteeship upon a bankrupt estate to hand over a proportion of his commission as trustee to other competitors was corrupt.

"I have not been able to satisfy myself that the decision in any of the cases to which I was referred would justify me in dismissing the action as I was asked to do by the defender's counsel. As regards the pooling arrangement, I do not see that there is anything corrupt in the manager of a business arranging for his remuneration as trustee being shared by the members of the firm whose business he manages. It is quite a usual arrangement that one of the partners in a law agent's or an accountant's business should communicate the fees earned by himself individually for discharging such duties as those of trustee on a sequestrated estate. If a partner may so communicate his fees I do not see why the manager of a business may not make a similar arrangement. What is communicated are fees actually earned, and the agreement entered into does not involve any failure of duty on the part of the trustee towards those whose interests he must protect. It is maintained, however, for the defender that the arrangement between the parties in this case enables the pursuers to get an undue preference over the other creditors of a bankrupt. The stipulations as to the pursuers receiving payment in full of any debt due to them by the bankrupt out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties. The creditors on the estate have not in any way suffered, and I do not think there is anything illegal in one creditor receiving more than the others as long as he does not receive a preference out of the bankrupt estate, on which all ought to rank equally. As regards the provision that the pursuers are to pool fees received by them for measurement work with the fees earned by the defender as trustee, I do not think that the averments are of such a character as to justify my holding that the whole agreement is illegal, and the defender freed from the obligations under which he has voluntarily come. It may be that as regards certain of the fees pooled it may be established that there was an improper stipulation which renders it against public policy to give effect to the provisions of the agreement; but I do not think that on a mere construction of the terms used I should be justified in sustaining without inquiry a plea which would free the defender from obligations deliberately undertaken by him. I shall therefore meantime order an account by the defender—a course which will allow him, if he can, to state and prove any illegality in connection with any of the particular items in the accounting."

The defender reclaimed, and argued—The agreement founded on by the pursuers was corrupt and illegal, and was therefore void. The class of illegal contracts under which it fell was that of matters affecting the particular duties of individuals whose duties were of public importance—Pollock on Contracts (8th ed.), p. 288. Under the agreement the defender might be placed in a position where his interest conflicted with his duty, and it was sufficient if he might. The Court would not enforce such an agreement —Goudy on Bankruptcy (3rd ed.), pp. 244, 365; *MacGown* v. *Tod,* December 13, 1808, F.C.; *M'Taggart's Representatives* v. *Robertson*, January 25, 1834, 12 S. 338; *Mann* v. *Dickson*, July 1, 1857, 19 D. 942. The case of a law agent benefiting indirectly by his position as judicial factor was different—*Sleigh* v. *Sleigh's Judicial Factor*, 1908 S.C. 1112, 45 S.L.R. 826. The case of *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496, founded on by the pursuers, differed from the present in that in that case there was nothing wrong in the contract itself but only in the means. Further, the agreement to pool fees was, under the Prevention of Corruption Act 1906 (6 Edw. VII, cap. 34), sec. 1 (1), (2), a criminal offence—*Graham* v. *Hart*, 1908 S.C. (J.) 26, 45 S.L.R. 332; *Bewdley Election Petition*, 1869, 19 L.T. 676, *per* Blackburn, J., at p. 678; *Harrington* v. *Victoria Graving Dock Company*, 1878, 3 Q.B.D. 549; *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369; *Hovenden & Sons* v. *Millhoff*, 1900, 83 L.T. 41; *Laughland* v. *Millar, Laughland, & Company*, February 19, 1904, 6 F. 413, and *per* Lord M'Laren at p. 417, 41 S.L.R. 325. If the Court was satisfied that the agreement is illegal, it would not enforce it—*Scott* v. *Brown, Doering, M'Nab, & Company*, [1892] 2 Q.B. 724; *North-Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited*, [1913] 3 K.B. 422.

Argued for the pursuers—The defender's argument would carry the doctrine of refusing implement to contracts on the ground that they were contrary to public policy, far beyond anything yet established—Pollock on Contracts (8th ed.), p. 332, side-note. The class of contracts thus struck at was very narrow, and would not be extended without clear necessity — *Printing and Numerical Registering Company* v. *Sampson*, 1875, 19 Eq. 462. If there were two ways of carrying out a contract, one legal and the other illegal, the Court would read the contract in the sense which allowed the contract to stand, and would presume that the parties meant to contract on that footing—*Thwaites* v. *Coulthwaite* (*cit. sup.*). The defender under the present agreement was not bound to take up any trusteeship, nor to employ the pursuers under any he took up. The only ground for saying that the present agreement was corrupt was that in certain events there might possibly be injury to creditors, but that could not happen in the present case, because the fees had actually been earned, and in any event to put parties in a position of temptation was not corrupt. The cases of *Graham* v. *Hart* (*cit. sup.*) and *Shipway* v. *Broadwood* (*cit. sup.*) were cases of bribery and not in point. The case of *Laughland* v. *Millar, Laughland, & Company* (*cit. sup.*) was a case of a particular corrupt transaction, while the present was a general contract. In *MacGown* v. *Tod* (*cit. sup.*), *M'Taggart's Representatives* v. *Robertson* (*cit. sup.*), and *Mann* v. *Dickson* (*cit. sup.*), there were corrupt bargains to employ which did not exist in the present case.

At advising—

LORD JUSTICE-CLERK—This is certainly in its particulars a peculiar case. It appears that the defender became a servant of the Farmers' Mart upon a fixed salary, and he was bound, with the exception of what his engagement allowed, to give his whole time to their business. He was allowed to occupy a farm of not more than 400 acres, that size being prescribed probably because his employers did not want him to be engaged in larger farming operations which might have interfered with their having the benefit of his services to the extent to which they required.

There was also this arrangement in the contract between them, and which has led to the present question—[*His Lordship quoted the fifth clause of the agreement.*]

Now that is an arrangement by which, quite plainly, the Mart was to get the benefit of carrying out sales or valuations in connection with estates under the management of the defender, in those cases where the defender had employed the Mart to carry out such sales or valuations, and that then their profits and his remuneration as trustee were to be pooled and halved between the parties. It seems to me quite clear that that was an arrangement which might lead to double interest, since it would be to the advantage of the defender to employ the Mart as salesmen or valuators in preference to others, and also to his advantage that their charges should be as high as possible, since 50 per cent. of the fees would ultimately find their way into his own pocket.

I do not think that the proper way to look at this case is to consider merely what has happened or what has been done in working out the arrangement. The question is not whether the defender has taken an improper advantage of his office, but whether he was in such a position as to be tempted to do so—that is to say, whether he was placed in such a position that his duty conflicted with his interest. In my opinion he was. A contract of this kind may be innocent in the sense that it may be possible to carry it out without committing any illegality. But that is not the right way to look at the contract in this case. Is the agreement one under which there may be a corrupt use of the defender's position? If so, and if under the agreement that may be done which the law strikes at, then I think the law strikes at the agreement itself because of what may be done and not because of what has been done.

Holding this view of the proper reading of the contract, I have come to the conclusion that the pursuers are not entitled to found on this contract, and that we ought to recall the Lord Ordinary's interlocutor.

LORD DUNDAS concurred.

LORD GUTHRIE—I am of the same opinion. The Lord Ordinary has repelled the third plea-in-law, which is to the effect that the agreement is corrupt and illegal. But he has made a reservation in his opinion which was admitted not to be consistent with the terms of his interlocutor, because he says—"It may be that as regards certain of the fees pooled it may be established that there was an improper stipulation which renders it against public policy to give effect to the provisions of the agreement."

It is averred by the pursuers, and it is not denied, that in several instances the defender acted as factor and trustee on sequestrated estates, but it is not said that he ever acted improperly. The question raised in this case is thus a pure question of construction of the agreement, seeing that there are no averments of corrupt conduct under any of the three heads which Mr Wilton founded on as involving Milne in a position of double interest. It was said by Mr Wilton, first, that the defender had an interest to employ the firm, whose servant he was, for valuations and other purposes; secondly, Mr Wilton said that he had an interest to allow his firm to pile up their charges if they were so employed; and thirdly, Mr Wilton said that he had an interest to deal favourably with his firm's claims as creditors.

I agree with your Lordship in thinking that in all these particulars Mr Milne had a direct and necessary double interest which the law will not allow. As was said by Mr Mitchell, almost any contract may involve the possibility of a double interest, but that is not to say that in every case a question of double interest necessarily or directly arises. Here, seeing that under the arrangement between him and his firm, the defender might participate in the results of any of those three things that I have mentioned, the case does come within the category of direct and necessary double interest.

Take the last of them—the interest that he had to deal favourably with his firm's claims. It appears that, under the 5th clause of the contract, when a division was made out of what had been pooled, "there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate." That was to be deducted. Therefore as much as possible should, in order to suit Milne, be charged against the estate, leaving as little as possible to be paid out of the fund of which he was to get a certain proportion.

Therefore I think, applying the words of Lord Chief-Justice Cockburn in the case of *Harrington*, (1878) 3 Q.B.D. 549, this was a case, whether you call it a bribe or not, where a payment or a promise of payment was given to this man in the cases where he acted as a factor or trustee which put him in the position of having a direct and necessary inducement to act otherwise than with loyalty and fidelity to the creditors whom he represented. In that case, as the Lord Chief-Justice puts it, "the agreement is a corrupt one and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be."

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first and third pleas-in-law for the defender, and dismissed the action.

Counsel for the Pursuers and Respondents — Sandeman, K.C. — Mitchell. Agents — Tait & Crichton, W.S.

Counsel for the Defender and Reclaimer —C. D. Murray, K.C. — Wilton. Agents — John C. Brodie & Sons, W.S.

Friday, December 12.

FIRST DIVISION.

[Scottish Land Court.

COUNTESS OF SEAFIELD'S TRUSTEES *v.* M'CURRACH.

Landlord and Tenant — Small Holding— "Lotted" Lands—Allotments—Statutory Small Tenant—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49)— *Applicability.*

The yearly tenant of certain "lotted" lands, extending in all to 11 acres odd, applied to the Land Court for an order determining, *inter alia*, whether he was a landholder or a statutory small tenant. The allotments in question formed part of lands laid out by the proprietor for occupation as agricultural subjects by householders in the adjoining village, and were held by the tenants under leases of one year or upwards, distinct from the leases or titles on which they held their houses. All the tenants, including the applicant, resided within two miles of their respective holdings. The applicant possessed and cultivated the allotments in question as one agricultural subject at an annual rent of £23, 12s. His dwelling-house and offices were held on a separate title, and were not included in the holding, on which there were no buildings.

Held that the provisions of the Small Landholders (Scotland) Act 1911 applied to the lands in question.

This was a Special Case stated by the Scottish Land Court at the request of A. D. Mackintosh and others (the Countess-Dowager of Seafield's trustees), *appellants*, in an application by John M'Currach, Fordyce, to determine, *inter alia*, whether he was a landholder or a statutory small tenant in respect of certain "lotted" lands of which the appellants were proprietors.

The *facts* are given in the note (*infra*) of the Land Court, which, on 8th May 1913, issued the following Order — "The Land Court having resumed consideration of this application, repel the objection taken for the respondents, that the Act of 1911 does not apply to the applicant's holding: Find that the applicant is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to the applicant as tenant has been